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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CHARLES BARMAT,

Appellant,

vs.

LLOYD ROBERTSON, Superintendent, DEPARTMENT OF LIQUOR LICENSES AND CONTROL; ARIZONA DEPARTMENT OF LIQUOR LICENSES AND CONTROL, an Arizona Administrative Agency,

Appellee.

ON APPEAL FROM THE
ARIZONA COURT OF APPEALS

JURISDICTIONAL STATEMENT

ROBERT J. HIRSH
L. Anthony Fines
Hirsh & Bayles, P.C.
120 West Broadway
Tucson, Arizona 85701
Telephone No. (602) 884-9630
Counsel for Appellant

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Counsel for Appellant

QUESTION PRESENTED

May state administrative agency suspend a person's liquor license solely because that person permitted nude dancing to take place on the licensed premises over the licensee's argument that the dance was expression protected by the First Amendment when there has been no judicial determination that the dancing partook more of gross sexuality than of communication and when the regulations prohibiting the nude dancing were promulgated without any evidence than nude dancing would lead to misconduct properly regulated by the state?

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The opinion of the Arizona Court of Appeals, which appears in the appendix hereto is reported at ___ Ariz. ___, 611 P.2d 101 (1980).

JURISDICTION

The decision of the Arizona Court of Appeals, reversing the decision of the Superior Court, and affirming the suspension of the Appellant's license by the Arizona Department of Liquor Licenses and Control was entered on February 22, 1980. See p.21a infra. A Petition for Review was denied by the Arizona Supreme Court on May 6, 1980.

A notice of appeal to this Court was duly filed in the Arizona Court of Appeals on June 27, 1980. See p.23a infra.

This appeal is being docketed in this court within ninety days from the denial of the Petition for Review below. The jurisdiction of this court is invoked under 28

U.S.C. §1257(2). The appeal is from a decision below against a claim that the state administrative regulations were constitutionally invalid as applied to the Appellant. See R. Stern & E. Gressman, Supreme Court Practice §3.4 (5th Ed. 1978).

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, United States Constitution:

Congress shall make no law . . . abriding the freedom of speech. . .

Fourteenth Amendment, United States Constitution:

. . .nor shall any state deprive any person of life, liberty, or property, without due process of law. . .

Twenty First Amendment, United States Constitution:

. . .The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. . .

Arizona Department of Liquor License and

Control Superintendent's Regulations R4-15-54 and R4-15-55:

"R4-15-54. Clothing Requirements, Employees

No licensee shall, on the licensed premises:

1. Employ or use any person as an entertainer or in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the areola of the female breast or any portion of his or her pubic hair, anus, cleft of the buttocks, vulva or genitals;

. . .

R4-15-55. Sex Acts Prohibited, Real or Simulated

A. No licensee shall permit, on the licensed premises, any person to perform acts of or acts which constitute or simulate:

* * * * * *

3. The displaying of any portion of the areola of the female breast, or any portion of his or her pubic hair, anus, vulva or genitals.

* * * * * *

C. No licensee shall permit any person to remain in or about the licensed premises who exposes to public view any portion of the areola of the female breast or any portion of his or her pubic hair, anus, vulva or genitals. If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end, the provisions of this rule are severable."

STATEMENT OF THE CASE

Charles Barmat, the Appellant, owns the Ranch House Theater near Tucson, Arizona. The theater is located about six miles from downtown Tucson, just off a freeway. There are no

neighbors nearby nor is there any pedestrian traffic. (Document 9, Clerk's Certification of the Record on Appeal, Item 1, page 31,34, Transcript of Administrative Record, December 5, 1975, hereinafter cited as Administrative Record at).

On August 29, 1975, the Appellant's liquor license was ordered suspended for ten days because he had permitted a woman to dance nude at Ranch House Theater. The Appellant has consistently believed that the dancing that he permits at his theater is protected expression. The dancers do comedy skids, interpretive dancing, vaudeville and pandomine. Administrative Record at 45-46. Similarly, a performer at the theater considers her dancing as an artistic endeavor. Id. at 39.

Consequently, the Appellant appealed the suspension to the state liquor board. At the appeal hearing, he sought to demonstrate that the dancing, albeit nude, was an artistic form of expression. Id. To this end, he brought

a firm of a typical dance performed at his theater, to the hearing. Two experts on modern dance testified that the dance, while technically imperfect, was the expression of emotions such as sadness. Id. at 15-16, 35-36. Specifically, he argued that the regulations in question were "unconstitutional as applied to events alleged to have transpired on July 16, 1975 as said regulations are violative of the freedom of expression secured by the First and Fourteenth Amendments to the Constitution of the United States." See Appeal to the Arizona Department of Liquor License and Control, September 3, 1975.

Despite the above efforts, the Department affirmed the suspension, solely because the dancer exposed certain areas of the body. See p.13a infra. There was no determination that the dance was grossly sexual or would otherwise lead to any type of misconduct. Id. Indeed, the chief liquor control officer for Southern Arizona testified at the hearing that there was no greater potential for violence

at the Ranch House Theater than at other places that serve alcohol:

[QUESTION BY MR. HIRSH]: There a potential for violence, as a matter of fact, in any bar that you go into if people are talking, if they shoot their mouths off in drinking, there is a potential for violence, am I correct sir:

WILLIAMS: Yes.

HIRSH: So the potential at the Ranch House isn't any greater than it is in any other bar or any other place where people congregate, they vocalize and they drink, isn't that true?

WILLIAMS: That's correct.

The Appellant appealed the decision to the Pima County Superior Court, arguing that the regulations" cannot be applied to the facts in the instant case and to do so would be to misconstrue California v. LaRue and violate

the First and Fourteenth Amendments to the Constitution of the United States." See Brief of plaintiff, Pima County Superior Court Cause No. 158329, July 15, 1976. The Superior Court ruled that before the license could be suspended, a judicial determination that the dance partook more of gross sexuality than of communication was required by the First Amendment. See p. 17a infra. The decision of the Superior Court was reversed by the Arizona Court of Appeals on February 22, 1980. See p. 21a infra. The Arizona Supreme Court denied review on May 6, 1980. Id. The decision holds that a license may be suspended if nude dancing occurs without a judicial determination that the dance partook more of gross sexuality than of communication. Id. The Arizona Court of Appeals stayed the suspension pending review by this Court. See p. 26a infra.

The regulations invoked to suspend the Appellant's liquor license were promulgated in 1973. At the hearing prior to the

promulgation, there was no evidence presented that grossly sexual entertainment of any kind was occurring in establishments licensed to sell liquor in Arizona or that any nude and semi-nude entertainment had led to crime or other misconduct. See Transcript of Public Hearing before Honorable Harold H. Moore, Superintendent of Arizona Department of Liquor Licenses and Control, August 14, 1973. Indeed, the superintendent expressly made no findings of fact. Id. at 30. Significantly, an owner of various bars in Arizona, one of which offered semi-nude dancing, testified that the bar that offered the semi-nude dancing generated less complaints and less trouble and misconduct than his other bars. Id. at 17-18.

The Appellant only seeks to presently have a judicial determination that the dancing at his theater is deserving of protection. His request is especially compelling because nude and semi-nude dancing has never been shown to be associated with crime or other

misconduct in Arizona.

THE QUESTION IS SUBSTANTIAL

The Appellant seeks to have this Court review on the merits of the decision of the Arizona Court of Appeals below. The Appellant's liquor license was suspended because he allowed a woman employee to dance nude on the licensed premises. The Appellant has argued consistently that the dance was a benign form of non-lewd expression. Despite this argument, the Appellant has never been afforded an opportunity to show that the dance in question had merit as a form of expression. Rather, the Arizona Department of Liquor Licenses and Control has mechanically applied regulations similar to those facially upheld in California v. LaRue, 409 U.S. 109 (1972) which were designed to prohibit bacchanalian revelries, to prescribe all forms of nude entertainment, regardless of artistic and expressive merit, in places licensed to

sell liquor.[1]

Thus, the Court is presented with the question expressly reserved in LaRue; does the instant application of the regulations create problems of constitutional dimension, apart from the facial validity of the regulations? Id. at 119 n.5

Moreover, the instant regulations, despite their surface similarity to those dealt with in LaRue, do not have the indicia of validity that attached to the California regulations. California promulgated its regulations only after administrative hearings showed that the grossly sexual entertainment at bars was closely connected with serious forms of sex related crime. In Arizona, not only has there never

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[1]Indicative of the present Arizona policy, is the suspension of the Phoenix Celebrity Theater's license for 50 days because the theater presented a national touring group's presentation of "Oh Calcutta," a Broadway play that contains nudity.

been showing that such entertainment existed, there was no evidence of a relationship between entertainment at liquor establishments and crime at all. Despite the above facts, the Appellant has been flatly denied any opportunity to demonstrate that the dancing at his theater was not grossly sexual, or that it was an innocent form of expression unconnected with crime or other misconduct. With no evidence that nude and semi-nude entertainment in Arizona at bars has ever been grossly sexual or led to crime, the Arizona courts have let stand an order of the Arizona Department of Liquor Licenses that irrebuttably presumes that the nude dancing of any sort at the Appellant's theater is undeserving of protection.

Significantly, the New York Court of Appeals, shortly after the decision in the court below, held that topless dancing could not be prescribed in bars in New York pursuant to regulations similar to those upheld in LaRue, and the instant ones, because New York had not

experienced the gross type of entertainment and associated crime that had occurred. Bellanca v. New York State Liquor Authority, No. 429 (1980) (reproduced in Appendix at p.28a infra. Clearly, the reasoning and holdings of the New York Court of Appeals and the Arizona Court of Appeals are in conflict.

It is respectfully submitted that a decision from this court is needed to clarify this important question of First Amendment law and to define the proper scope and application of LaRue. The above reasons are set out in greater detail below.

It has long since been established that the speech protected by the First Amendment is not strictly limited to purely verbal speech. See e.g. Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975); Spence v. Washington, 418 U.S. 405 (1974); Tinker v. Des Moines Independent Com. Sch. Dist., 393 U.S. 503 (1969). Following from this understanding, this Court has also held that live performances

by entertainers in the nude may also be protected by the First Amendment. Doran v. Salem Inn, 422 U.S. 922 (1975); Southeastern Promotions, supra; c.f. Erzoznik v. City of Jacksonville, 422 U.S. 205 (1979) (ordinance prohibiting drive-in move theaters from showing firms depicting nudity is violative of the First Amendment).

In Doran, supra, this Court strongly suggested that the above protection extend to dancing in the nude by upholding an injunction against the enforcement of an ordinance that prohibited bar owners and others from allowing employees, including entertainers, from appearing in the nude.

Moreover, nude dancing is increasingly becoming an accepted form of expression in the American artistic community: (see Document 9, Clerks Certification of Record on Appeal, Item 1, Transcripts of Administration record at 15-18, 35-36). Indeed, nude dancing is well rooted in the history of cultures of countries

other than our own. Id. Similarly, one of America's most celebrated inovative dancers, Isadora Duncan, was an advocate of dancing in the nude. See I. Duncan, The Art of the Dance, p. 58 (1928).

In decisions scrutinizing regulations and statutes that purport to regulate activities that may enjoy First Amendment protection, two general principles are regularly present. First, the government is severely restricted in its power to prohibit some kinds of expression, on grounds of its potential offensiveness, especially when the proscription is content based. Erzoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972). Second, even if the regulation involved only incidentally impacts on protected expression and is primarily directed towards non-protected conduct, the government interest sought to be protected must be unrelated to expression, and the restriction on protected expression must be

no greater than is essential to the furtherance of the legitimate government interest. United States v. O'Brien, 391 U.S. 367, 377 (1968). See Schneider v. State, 308 U.S. 147 (1939). See generally, Wormuth & Mirkin, The Doctrine of the Reasonable Alternative, 9 Utah L.Rev. 254 (1964).

Moreover, even if the statute is properly drawn, it may nevertheless be unconstitutionally used to prohibit or punish protected expression. See Jenkins v. Georgia, 418 U.S. 153 (1974); Watts v. United States, 394 U.S. 705 (1969). In such cases, of course, courts retain the power to independently exclude the protected expression from the ambit of the statute. Accord: California v. LaRue, 409 U.S. 104, 119 n.5 (1972). Similarly, it is well established that the judiciary is uniquely qualified to determine whether particular expression is of the type entitled to constitutional protection. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546,

561-62 (1975). An administrative agency may be less sensitive than a court to the constitutionally protected interests in free expression. Id.

In the instant case, the Appellant's license was suspended because of a violation of a regulation that appears to be substantially equivalent to the regulations held facially constitutional in California v. LaRue, 409 U.S. 109 (1972). The Arizona regulations in fact, however, are substantially different from the regulations considered in LaRue. Prior to the promulgation of the California regulations, the California Department of Alcoholic Beverage Control (A.B.C.) conducted hearings concerning the taverns offering nude dancing. At these hearings, evidence was introduced which showed that numerous acts clearly unprotected by the First Amendment of legitimate concern to A.B.C. were occurring on or near these premises. Id. at 110-111. These acts included oral copulation between

customers and women entertainers, public masturbation, prostitution, indecent exposure to young girls, attempted rape, rape and assaults on police officers. Id. All these acts were apparently a direct product of the taverns offering Bacchanalian revelries in the nude as entertainment. While recognizing that at least some of the proffered entertainment was protected by the First Amendment, this Court found that the regulations were directed towards "performances that partake more of gross sexuality than of communication." Id. at 118. This Court concluded by stating:

> This is not to say that all such conduct and performance is without the protection of the First and Fourteenth Amendment. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we

> to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater. Id. at 118.

Apparently, the regulations of LaRue were necessary to combat the acts described at the administrative hearing. See United States v. O'Brien, 391 U.S. 367, 377 (1968).

That is not the case in Arizona. At the hearings prior to the promulgation of the Arizona regulations, the Arizona Department of Liquor Licenses and Control expressly made no findings of fact. Perhaps more importantly, there was no evidence that the types of acts that had occurred in California as a result of nude entertainment at bars had also occurred in Arizona. Indeed, what evidence was presented affirmatively

indicated that those types of acts had not occurred in connection with nude entertainment at establishments licensed to sell liquor in Arizona. Moreover, at the administrative appeal in the instant case, a sergeant for the Arizona Department of Public Safety who supervised liquor enforcement in Southern Arizona agreed that the potential for violence at the Appellant's theater where nude entertainment was offered, was not any greater than the potential for violence in other places that serve liquor.

In the past, where this Court has employed an invigorated scrutiny in reviewing legislative enactments, it has not been willing to assume that the legislative body had the requisite reasons and justification for its enactment. When the statutes are not supported by the proper reasons (even though arguably those reasons exist), the statute is declared unconstitutional. Califano v. Goldfarb, 430 U.S. 199, 216-17 (1977); see Craig v. Boren,

429 U.S. 1980, 199-200 n.7, 204 (1976); Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976); Trimble v. Gordon, 430 U.S. 767, 768-69 (1977) ("In a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purose"). Bates v. City of Little Rock, 361 U.S. 516, 525 (1962).

A similar principle in the First Amendment context was stated by Mr. Justice Brandeis in his concurring opinion in Whitney v. California, 274 U.S. 357 (1927); Overruled Brandenburg v. Ohio, 395 U.S. 705 (1969).

> The legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity. Id. at 374 (Brandeis

joined by Holmes, J. J., concurring).

While in most of the above cases, this Court was concerning itself with statutes which discriminated on the basis of gender, they are nevertheless applicable to the case at bar. Statutes which impinge on expression which is protected by the First Amendment are subject to the strictest scrutiny. Buckley v. Valeo, 424 U.S. 1, 41 (1976): Statutes which discriminate based on gender, however, are only subject to a lesser intermediate level of review. Craig v. Boren, 429 U.S. 190, 197-99 (1975).

Obviously, then, if statutes which discriminate on the basis of gender are not presumed to rest on a proper legislative intent, neither should administrative regulations which impinge on the First Amendment benefit from such a presumption. In short, there has been no showing that these regulations are substantially necessary to protect a

legitimate state interest.

In LaRue, the Court reasoned that the Twenty First Amendment enabled California to proscribe nude dancing in bars even if such a proscription would be invalid outside the context of liquor regulation. 409 U.S. at 114-117. This reasoning, however, is necessarily limited to the acts of gross sexuality described in LaRue. Otherwise, after determining that the mixing of political discussion with alcohol leads to violence a state could prohibit political discussions in bars. Similarly, after a similar finding, a state could prohibit the discussion of sports or the viewing of televised sports events in bars. Obviously, the Twenty First Amendment does not supercede the First Amendment to such an extent.

This conclusion is supported by legislative history to the Twenty First Amendment which indicates that it was intended only as a limit to the commence clause. 72 Cong. Rec. 4140-4141, 4143 (1934) (Comments of Sen. Blaine).

Moreover, the Twenty First Amendment is not sufficient to validate a statute which otherwise impermissibly discriminates on the basis of gender. See Craig v. Boren, supra, at 207. There is no reason why that amendment cannot be used to support legislation which discriminates based on sex, but can be used to infringe on First Amendment protected expression.

Even if nude dancing is to be afforded less protection than other First Amendment protected expression, c.f. Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) (plurality opinion); F.C.C. v. Pacific Foundation, 438 U.S. 726 (1978) (plurality opinion), the standard of review applied to nude dancing in establishments licensed to sell liquor should not be less vigorous than the intermediate standard applied to liquor licensing statutes which discriminate based on sex.

Even if it is assumed that the Arizona Department of Liquor Licenses and Control

enacted these regulations to prevent the conduct that occurred in California from also occurring in Arizona, the Department could have achieved those same ends without the severe First Amendment infringement of prohibiting all nude entertainment in bars. United States v. O'Brien, 391 U. S. 367, 377 (1968). Wormuth & Mirkin, The Doctrine of the Reasonable Alternative, 9 Utah L.Rev. 254 (1964). The testimony before the A.B.C. in California may have shown that the California regulations were the minimum necessary to prevent the Bacchanalian Revelries and the associated crime that had occurred in California. In Arizona, however, there are other liquor regulations which could adequately control the potential misconduct. See R4-15-57 and R4-15-32 (see p.49a infra). Moreover, Arizona could always enact other regulations and statutes which would directly regulate condut properly prohibited. That these other regulations are sufficient is supported by the chief

liquor enforcement officer for Southern Arizona who testified that the potential for violence was not greater at the Appellant's theater than bars that serve liquor without such entertainment. Clearly, where other less restrictive and reasonable alternatives are available, the State is obliged to employ them first. Schneider v. State, 308 U.S. 147, 162 (1939). Similarly, it may be argued that before a state may silence protected speech to prevent serious violations of the law, it must first endeavor to directly prevent the feared violations. Id. Feiner v. New York, 340 U.S. 315, 326-27 (1950) (Black, J. dissenting). See Whitney v. California, 342 U.S. 357, 378 (1947) (Brandeis, J., concurring).

What the Appellant only seeks here is that which is always given to persons who claim that they are protected by the free speech clause of the First Amendment, that is a judicial determination that his speech is is protected by the First Amendment. Freeman

v. Maryland, 380 U.S. 51, 58 (1965), Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 561-62 (1975). Even materials alleged to be obscene are normally entitled to a judicial determination that they are unprotected, before they can be seized. Lo-Ji Sales, Inc. v. New York, ____ U.S. ____ 99 S.Ct. 2319, 2324 n.5 (1979). As it stands now, the Appellant will have his license suspended because an administrative agency has determined that he permitted dancers to perform in the nude on his licensed premises. He has never been given the opportunity to show that the dancers were not grossly sexual or otherwise constitutionally unprotected. In effect, the performance, despite the fact that courts would normally protect it with heightened scrutiny, has been irrebuttably presumed to be grossly sexual. Compare Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972). Not only has the Appellant been

precluded from establishing that the dancing that occurred at his theater was not grossly sexual and did not lead to crime, there has never been any showing that nude entertainment in bars in Arizona has ever been grossly sexual or has led to crime. C.f. Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring).

Finally, the New York Court of Appeals has applied similar analysis to some of the above to invalidate New York liquor regulations that banned topless dancing in bars. Bellanca v. New York State Liquor Authority, No. 249 (1980) (reproduced in Appendix at p. 28a infra. As in Arizona, there was no factual support in New York that such entertainment would lead to criminal activity. (Compare the California experience detailed in LaRue). Id.

The reasoning in Bellanca is directly contrary to the decision below in this case by the Arizona Court of Appeals. While the New York dancing was only topless dancing as

compared to the totally nude dancing here, that should not be a difference of constitutional dimension. Regulations proscribing both forms of dancing were upheld in LaRue, and the Arizona regulation prohibit both types of dancing. The differing results in the case at bar and Bellanca, may be in part attributable to conflicting dicta in this court concerning the scope of LaRue. Other lower courts have also arrived at conflicting decision following LaRue. See e.g. Clark v. City of Freeman, Nebraska, 377 F.Supp. 327 (D.Neb. 1974); Escheat Inc. v. Pierscoff, 354 F.Supp. 1179 (W.D.Wisc. 1973); Peto v. Cook, 364 F.Supp. (S.D.Ohio 1973) aff'd 415 U.S. 943 (1974); Richter v. Dept. of Alcohol Beverage Control, 539 F.2d 1168 (9th Cir. 1977). For instance in Craig v. Boren, this Court stated that:

> "It is true that California v. LaRue [citation omitted] relied on the Twenty First Amendment to

'strengthen' the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances 'partake more of gross sexuality than of communication.'" (Emphasis added) 429 U.S. at 207.

But, in Doran v. Salem Inn, this Court reasoned as follows:

In LaRue, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty First Amendment, outweighed any First Amendment interest in nude dancing and that a state could therefore ban such dancing as part of its liquor license program."
422 U.S. at 932-34 (emphasis added).

Moreover, it is not clear whether footnote

5[2] in LaRue means that every litigant should be able to prove that his or her performance should not fall within the ambit of LaRue, or whether such a remedy is only available in an exceptional case. It is respectfully submitted that this Court should review this case on the merits to clarify this area of the law.

CONCLUSION

The Appellant's liquor license was ordered suspended, after an entertainer danced in the nude at his licensed theater. The regulations invoked to suspend his license are facially equivalent to the regulations upheld in California v. LaRue which were promulgated to

---

[2]"Although it is possible that specific future applications of [The statute] may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that so considered, the legislation is constitutionally valid." 409 U.S. at 419 n.5.

check the grossly sexual, bacchanalian revelries that had been going on in California. Nevertheless, the Appellant has never been afforded an opportunity, either at an administrative or judicial hearing, to show that the dance at his theater was not of the type described in LaRue. Rather, the regulations have been mechanically applied in Arizona to ban all nude dancing, regardless of merit, at the Appellant's theater. The situation is further exacerbated because, in Arizona unlike California, there has never been a finding that nude entertainment at bars was grossly sexual or that it led to crime and misconduct. In short, with no substantial basis, the dancing at the Appellant's theater has been irrebuttably presumed to be unprotected.

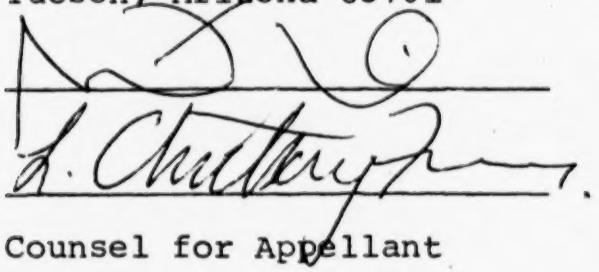
Finally, the decisions in the lower courts on this point are in conflict. Significantly, the New York Court of Appeals and the Arizona Court of Appeals almost simultaneously decided cases in this area which are inconsistent.

Compare Bellanca v. New York State Liquor Authority (p. 28a infra) with the instant case (p. 1a infra). The above inconsistencies may be in part traceable to dicta in the decisions in this Court which can be interpreted to support either position. Compare Craig v. Boren, 429 U.S. 190, 207 (1976) with Doran v. Salem Inn, 422 U.S. 922, 932-33 (1975).

For all of the above reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

ROBERT J. HIRSH
L. Anthony Fines
Hirsh & Bayles, P.C.
120 West Broadway
Tucson, Arizona 85701



Counsel for Appellant

Dated: August 4, 1980

CHARLES BARMAT,
Plaintiff/Appellee,

vs

LLOYD ROBERTSON, Superintendent, Department of Liquor Licenses and Control; Arizona Department of Liquor Licenses and Control, an Arizona administrative agency,
Defendants/Appellants.

No. 2 CA-CIV 3299

Court of Appeals of Arizona
Division 2

February 22, 1980

Rehearing Denied April 9, 1980.

Review Denied May 6, 1980.

OPINION

HATHAWAY, Chief Judge.

This is an appeal from a superior court order reversing a decision of the Arizona Department of Liquor Licenses and Control to suspend appellee's liquor license. The basis for the decision was that the state had not met its burden of proving that a dance performance on appellee's premises partook more of gross sexuality than of communication. The issue presenting on appeal is:

"Does a finding by the Arizona State Liquor Borad that a licensee violated the nude dnacing provisions of Superintendent's Regulations R4-15-54.1, R4-15-55.-A.3 and R4-15-55.C require judicial determination that a the conduct found to be in violation partook more of gross sexuality that communication in order for an order of suspension is issue?"

Regulations 4-15-54 and 4-15-55 provide:

"R4-15-54. Clothing Requirements, Employees No licensee shall, on the licensed premises:

1. Employ or use any person as an entertainer or in the sale or service of alcoholic beverages in or upon the licenses premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the areola of the female breast or any portion of his or her pubic hair, anus, cleft of the buttocks, vulva or genitals;

. . .

R-415-55. Sex Acts Prohibited, Real or Simulated

A. No licensee shall permit, on the licensed premises, any person to perform acts or or acts which constitute or simulate:

* * * * * * * * * * * * * * * * *

3. The displaying of any portion of the areola of the female breast, or any portion of his or her pubic hair, anus, vulva or genitals.

* * * * * * * * * * * * * * * * * * *

C. No licensee shall permit any person to remain in or about the licensed premises who exposes to public view any portion of the areola of the female breast or any portion of his or her pubic hair, anus, vulva or genitals.

If any provision of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or

application, and to this end, the provisions of this rule are severable."

It is undisputed that the female entertainer who performed upon the licenses premises was nude. The liquor board found that appellee had violated the foregoing regulations and therefore suspended his liquor license for a period of ten days. On appeal to superior court, the suspension order was originally upheld, the court finding "that while the Board's Findings of Facts did not contain a finding that the dance in question partook more of gross sexuality than of communication, the Verbatim Transcript supports such a finding." On reconsideration, the court ruled that prior to suspension of the license, a judicial determination in an adversary hearing of whether the performance giving rise to the suspension constitution gross sexuality was required. At the time set for hearing, the state presented no additional evidence but rested on the transcript of the admin-

trative record before the liquor board. Its position was that a judicial hearing was not required and that the administrative decision was supported by the evidence presented.

In setting aside its prior order of affirmance, the trial court stated:

"That without exception, the federal cases cited to the Court by the parties clearly establish that before the decision of the defendants to suspend the plaintiff's liquor license for ten days may be modified, affirmed or reversed in whole or in part by the Superior Court pursuant to A.R.S. Sec. 12-911, there must be a judicial determination in an adversary hearing of whether the performance giving rise to the suspension constitutes gross sexuality and thus within the permissible limits of regulation as set forth in California v. LaRue,409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), as was recently stated:

'[T]he First Amendment requires prompt judicial determination in such cases

"because of the independence of the judiciary and because of the 'sensitive tools' which the judiciary brings to the delicate task of distinguishing between protected and unprotected speech'".

Clark v City of Freemont, Nebraska, 377, F.Supp. 327, 340 (1973)." (Emphasis in original)

We do not agree and reverse.

In California v. LaRue, supra, the United States Supreme Court sustained the facial constitutionality of California Liquor Department Regulations similar to those involved here. Because of its interpretation of the Twenty-first Amendment, the court found it unnecessary to decide the issue of the regulations' constitutionality by traditional First Amendment standards. 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342. While the court admitted the regulations proscribed some forms of entertainment entitled to the protection of the First Amendment, the regulations were addressed to the conduct rather than speech elements of the entertainment. Id.

The court went on to apply a rational basis test, stating that a state may promulgate broad prophylactic rules banning sexually explicit entertainment at licensed taverns so long as they present a reasonable exercise of a state's Twenty-first Amendment powers and are rationally related to the furtherance of legitimate state interests. Because the court could not conlcude that the department's decision that certain sexual performances ought not occur at licensed taverns selling liquor as a drink was an irrational one, the regulation on its face did not violate the First and Fourteenth Amendments to the Constitution. Id.

We agree with the Ninth Circuit Court of Appeals in Richter v. Department of Alcoholic Beverage Control, 559 F.2d 1168 (1977), in which it was held that a judicial determination that the nude dancing was more a form of "gross sexuality" than "communicative expression" is not required before a license may be revoked.

Appellee relies on several district court cases for the proposition that LaRue did not sanction any erosion of the First Amendment protections where the performance did not partake of gross sexuality akin to a bacchanalian revelry. See Clark v City of Freemont, Nebraska, supra; Peto v. Cook, 364 F.Supp. 1 (S.D.Ohio 1973), aff'd sub nom. Guggenhein v Peto, 415 U.S. 943, 94 S.Ct. 1462, 39 L.Ed.2d 560 (1974); Escheat, Inc. v. Pierstorff, 354 F.Supp. 1120 (W.D. Wis. 1973). He also points to dicta from Craig v Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), which held the strength of the presumption of validity of regulations made pursuant to the Twenty-First Amendment is not sufficient to defeat an otherwise established claim of invidious discrimination in violation of the equal protection clause. The court stated in Craig:

"California v. LaRue, 409 U.S. 109, 115 [93 S.Ct. 390, 395, 34 L.Ed.2d 342] (1972), relied upon the Twenty-frist Amendment to 'strengthen' the State's authority to regu-

late live entertainment at establishments licensed to dispense liquor, at least when the performances 'partake more of gross sexuality than of communication.' (citations omitted)." 429 US at 208, 97 S.Ct. at 462. (Emphasis in original)

The LaRue decision did recognize, however, that some of the performances prohibited by the California regulations, although within the scope of First Amendment protection, could be limited as to location:

"While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." 409 U.S. at 118, 93 S.Ct. at 397.

In Doran v. Salem Inn, Inc,, 422 U.S. 922 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), another

case involving regulation of topless dancing, the author of LaRue, Mr. Justice Rehnquist, referred to LaRue:

"Although the customary 'barroom'type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v. LaRue, 409 U.S. 109, 118 [93 S.Ct. 390, 397, 34 L.Ed2d 342] (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In LaRue, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as part of its liquor license program." 422 U.S. at 932, 933, 95 S.Ct. at 2568. (Emphasis in original)

We agree with the Richter court that nude dancing is not the subject of prohibition but rather the serving of liquor in establishments that provide nude dancing. The goal of the

regulation is not censorship of expression but the prevention of crime and disorderly conduct which the combination of nude dancing and alcoholic inebriation might produce. Because the state can constitutionally prohibit the serving of liquor in establishments which provide nude dancing, judicial inquiry as to whether the entertainment is grossly sexual or not is irrelevant.

Reversed with directions to affirm the administrative decision.

HOWARD and RICHMOND, JJ., concur.

DEPARTMENT OF LIQUOR LICENSES AND CONTROL

STATE OF ARIZONA

In the Matter of the Suspension of the Spirituous Liquor License Series No. 6 Issued to: CHARLES BARMAT, Ranch House, 4950 Casa Grande Hwy., Tucson, Arizona 85704.

ORDER OF SUSPENSION

NO. 473

THE SUPERINTENDENT OF THE DEPARTMENT OF LIQUOR LICENSES AND CONTROL, under the provisions of Title 4, A.R.S., Section 4-210 A hereby SUSPENDS the spirituous liquor license, Series No. 6 issued to: Charles Barmat
Ranch House
4950 Casa Grande Hwy.
Tucson, Arizona 85704

for a period of ten (10) days, effective the 29th day of September 1975 at 6:00 o'clock A.H. to the 9th day of October 1975 at 6:00 o'clock A.M., inclusive, on the following grounds:

1. On July 16, 1975, between 4:25 o'clock P.M. and 4:47 o'clock P.M., the licensee permitted, employed or used a person as an entertainer, one Carol Trendlay, who, in and upon the licensed premises and during the course of her entertainment, appeared and performed acts in such a manner or attire, costume or clothing that she was in a state of nudity whereby she exposed to view and displayed the areola and nipples of her breast, portions of her pubic hair, her anus, the cleft of her buttocks, her vulva and genitals, in violation of Superintendent's Regulation R4-15-54 (1), R4-15-55 A (3) and R4-15-55 C; said regulations adopted pursuant to A.R.S. 4-112 B.

YOU HAVE THE RIGHT TO APPEAL this Suspension to the State Liquor Board by filing with the Department, an Appeal in writing and in detail within 10 days from the date hereof.

DATED at Phoenix, Arizona, this 29th day of August 1975.

/s/ ROBERT R. BEAN

ROBERT R. BEAN, SUPERINTENDENT

ATTEST:

/s/ ROSE M. HARO

SECRETARY

STATE LIQUOR BOARD

STATE OF ARIZONA

- - -

In the Matter of the Suspension of the Spirituous Liquor License, Series No. 6 Issued to CHARLES BARMAT, Ranch House, 4950 Casa Grande Highway, Tucson, Ariz. 85704.

ORDER NO. 480
FINDINGS OF FACT AND CONCLUSIONS OF LAW
ORDER OF SUSPENSION NO. 473

Pursuant to the Order of the Honorable W.E. Druke, Superior Court Judge of the State of Arizona, in and for the County of Pima, issued October 15, 1976, in the matter of CHARLES BARMAT, PLAINTIFF vs. ROBERT R. BEAN, et al DEFENDANTS, #158329, the Arizona State Liquor Board hereby makes the following formal Findings of Fact and Conclusions of Law and Order.

I. FINDINGS OF FACT:

1. That Charles Barmat was issued a Series No. 6 spirituous liquor license on the 9th day of October 1973 for the operation of the Ranch House, located at 4950 Casa Grande Highway, Tucson, Ariz.

2. The Board Finds that the licensee on the 16th day of July 1975, between 4:25 o'clock P.M. and 4:47 o'clock P.M., permitted, employed or used a person as an entertainer, one Carol Trendlay, who, in and upon the licensed premises and during the course of her entertainment, appeared and performed acts in such a manner or attire, costume or clothing that she was in the state of nudity whereby she exposed to view and displayed the areola and nipples of her breast, portions of her pubic hair, her anus, the cleft of her buttocks, her vulva and genitals, in violation of Superintendent's Regulation R4-15-54 (1), R4-15-55 A (3) and R4-15-55 (C); said regulations were duly adopted pursuant to A.R.S. 4-112 B and A.R.S. 41-1001 et seq.

II. CONCLUSIONS OF LAW:

1. The licensee has violated Superintendent's Regulation R4-15-54 (1), R4-15-55 A (3) and R4-15-55 (C).

ORDER

IT IS HEREBY ORDERED that the Superintendent's decision be, imposing a ten (10) days suspension, hereby is affirmed; and

IT IS FURTHER ORDERED that the Appeal of the Order of Suspension No. 473 be, hereby is dismissed.

DATED at Phoenix, Arizona, this 5th day of November 1976.

STATE LIQUOR BOARD

L.S. SHANLER, CHAIRMAN

OLIVER C. DRACHMAN, VICE-CHAIRMAN

DONALD C. PREMEAU, MEMBER

ATTEST:

Board Secretary

24 February 19 77
NORMA M. FELIX, Clerk
Rosemarie Chastain Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

WILLIAM E. DRUKE
JUDGE, ~~COURT COMMISSIONER~~
of the Superior Court

NO. 158329

DATE 24 February 1977

CHARLES BARMAT,
PLAINTIFF

PLAINTIFF'S ATTORNEY

ROBERT R. BEAN, etc., et al,
DEFENDANTS

DEFENDANTS' ATTORNEYS

MINUTE ENTRY

The Court having taken certain pending matters under advisement and being fully advised in the premises finds and rules as follows.

PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION:

The Court being advised by counsel for the defendants subsequent to the hearing on 12 January 1977 that they would abide by their former agreement with the plaintiff until the Court had ruled on the merits of the appeal, so long as such a ruling was forthcoming within a reasonable period of time,

IT IS ORDERED that the Plaintiff's Application for Preliminary Injunction be DENIED as being unnecessary.

PLAINTIFF'S MOTION TO STRIKE FINDINGS OF FACT AND CONCLUSIONS OF LAW:

IT IS ORDERED that the plaintiff's Motion to Strike be DENIED, the Findings of Fact and Conclusions of Law filed with the Court on 8 November 1976 being supported by the evidence presented during the hearings held on 31 October 1975 and 5 December 1975.

THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The plaintiff having filed a request pursuant to A.R.S. Section 12-911 (C), the Court finds the following facts specially

Rosemarie Chastain, Deputy Clerk.

and states separately its conclusions of law thereon.

FINDINGS OF FACT

1. That the Findings of Fact of the State Liquor Board dated 5 November 1976 are supported by the Verbatim Transcript of the hearings held on 31 October 1975 and 5 December 1975.

2. That while the Board's Findings of Fact do not contain a finding that the dance in question partook more of gross sexuality than of communication, the Verbatim Transcript supports such a finding.

3. That counsel for the State Liquor Board neither participated in nor advised the board (except insofar as he was required to do so as an advocate before the Board) in its decision that the plaintiff violated the regulations in question on 16 July 1975.

CONCLUSIONS OF LAW

1. That the Court of Appeals in Longbridge Investment Company vs. Moore, 23 Ariz. App. 353, 533 P.2d 564 (1975), held that the regulations in question are valid and constitutional on their face.

2. That the regulations in question have not been unconstitutionally applied in the instant case to conduct protected by the First Amendment, i.e., conduct in which there is present a "communicative element." California vs. La Rue, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972)

3. That there was no denial of due process at the hearings conducted on 31 October 1975 and 5 December 1975 simply because the attorney acting as the prosecutor was on other occasions the legal advisor to the Board.

IT IS THEREFORE ORDERED that the action taken by the

Rosemarie Chastain, Deputy Clerk.

MINUTE ENTRY

Page No. 2 Date 24 February 1977 Case No. 158329

defendants suspending the plaintiff's liquor license for ten days be AFFIRMED.

JUDGE

copies to:

Charles E. Buri, Assistant Attorney General

Hirsh, Shiner & Polis. P.C. - James Shiner, Esq.

Court Administrator

Hon. W. E. Druke

M.A.Martin (ruling)

Rosemarie Chastain, Deputy Clerk.

FILED
5 April 1977
NORMA M. FELIX, Clerk
R. Chastain Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

WILLIAM E. DRUKE
JUDGE, ~~COMMISSIONER~~
of the Superior Court

NO. 156329

DATE 5 April 1977

CHARLES BARMAT,
PLAINTIFF

PLAINTIFF'S ATTORNEY

ROBERT R. BEAN, et al,
DEFENDANTS

DEFENDANTS' ATTORNEYS

PLAINTIFF'S MOTION FOR REHEARING AND MOTION TO AMEND AND MAKE ADDITIONAL FINDINGS OF FACT:

MINUTE ENTRY

The Court having taken plaintiff's motions under advisement, and being fully advised in the premises, finds and rules as follows.

1. That the following Order, Finding of Fact and Conclusion of Law by the Court in its Minute Entry dated 24 February 1977 are hereby VACATED and SET ASIDE:

A. The Order affirming the suspension of plaintiff's liquor license;

B. Finding of Fact No. 2; and

C. Conclusion of Law No. 2.

2. That all other Orders, Findings of Fact and Conclusions of Law in said Minute Entry are hereby AFFIRMED.

3. That without exception, the federal cases cited to the Court by the parties clearly establish that before the decision of the defendants to suspend the plaintiff's liquor license for ten days may be modified, affirmed or reversed in whole or in part by the Superior Court pursuant to A.R.S. §12-911, there must be a judicial determination in an adversary hearing of whether the performance giving rise to the

Rosemarie Chastain, Deputy Clerk.

suspension constitutes gross sexuality and thus within the permissible limits of regulation as set forth in California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L. Ed. 2d 342 (1972), as was recently stated:

> "(T)he First Amendment requires prompt judicial determination in such cases 'because of the independence of the judiciary and because of the "sensitive tools" which the judiciary brings to the delicate task of distinguishing between protected and unprotected speech.'" Clark v. City of Fremont, Nebraska, 377 F. Supp. 327, 340 (1973).

IT IS THEREFORE ORDERED that the Court Administrator set the matter for a hearing within thirty (30) days in a Civil Division to be assigned.

JUDGE

cc:

Charles E. Buri - Assistant Attorney General

Hirsh, Shiner & Polis

Court Administrator

Hon. W. E. Druke

Marguerite Wade (ruling)

Rosemarie Chastain, Deputy Clerk.

FILED

APR 17 3 12 PM '79

JAMES [illegible]
CLERK SUPERIOR COURT
BY [signature]
DEPUTY

HIRSH, SHINER & WALKER, P.C.
Attorneys at Law
120 West Broadway
Tucson, Arizona 85701

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

CHARLES BARMAT Plaintiff, vs. ROBERT R. BEAN, et al Defendant.	NO. 158329 JUDGMENT AND ORDER

This matter, having come up for hearing on April 2, 1979, before the Honorable William Druke, Judge of the Superior Court, on the issue of whether the performance in question partook more of gross sexuality than of communication;

The State, having appeared through counsel, Jack Kelly, Assistant Attorney General for the State of Arizona, and the Plaintiff, having appeared through counsel, William G. Walker;

The State, having stipulated that it had the burden of going forward and resting on the transcript of the record without presenting any additional evidence;

The Plaintiff, having thereafter requested the Court to enter a finding that at this hearing the State had not met its burden of proving that the dance in question partook more of gross sexuality than of communication; and

The Plaintiff further requesting that the Court, based on said finding, reverse the suspension of the Plaintiff in this matter;

hirsh, shiner, walker P.C.
ATTORNEYS AT LAW
120 West Broadway Tucson, Arizona 85701 (602) 884-9630
La Placita Village

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT Because the State has not met its burden of proving that the performance in question partook more of gross sexuality than of communication, that the decision of the Liquor Board to suspend Plaintiff's license is reversed.

JUDGE OF THE SUPERIOR COURT

Approved as to form:

Jack Kelly
Assistant Attorney General
State of Arizona

hirsh, shiner, walker P.C.
ATTORNEYS AT LAW
120 West Broadway Tucson, Arizona 85701 (602) 884-9630
La Placita Village

BOOK 1818 PAGE 955 (R)

In The Court of Appeals
State of Arizona
Division Two

COURT OF APPEALS SEAL DIVISION TWO

MANDATE

To the Honorable Superior Court of Arizona in and for the County of PIMA

THE STATE OF ARIZONA, to the Honorable Superior Court of the State of Arizona in and the County of PIMA, greeting:

WHEREAS, lately in the Superior Court of the State of Arizona in and the County of PIMA, before you in a cause between

CHARLES BARRAT, Plaintiff,

v.

ROBERT R. BEAN, Superintendent, Department of Liquor Licenses and Control; ARIZONA DEPARTMENT OF LIQUOR LICENSES AND CONTROL, an Arizona administrative agency, Defendants.

NO. 158329

as by the inspection of the record of the Superior Court, which record was brought into the Court of Appeals, Division Two, State of Arizona, by virtue of an appeal by DEFENDANTS,

in the manner prescribed by law,

AND WHEREAS, in November 19 79 the cause came on to be heard before the Court of Appeals, Division Two, and was submitted for decision without argument.

ON CONSIDERATION WHEREOF, it was on the 22 day of February, 1980, ordered by this Court that the judgment on appeal of the Superior Court, in this cause, be reversed with directions to affirm the administrative decision -- all in accordance with the OPINION of this Court.

YOU ARE COMMANDED that such proceedings be had in said cause as shall be required to comply with the O P I N I O N of this Court; certified copy of said O P I N I O N is attached hereto.

WITNESS, The Honorable James D. Hathaway, Chief Judge of the Court of Appeals, Division Two, of the State of Arizona, this 22 day of May, 1980.

COSTS OF N O N E

Clerk	$
Reporter's Transcript	$
Transcript of Record	$
Brief	$
Total	$ None

Elizabeth Ulsaker Dietz
Clerk, Court of Appeals, Div. Two,
State of Arizona

NO. 2 CA-CIV 3299

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CHARLES BARRAT, Plaintiff/Appellee.

vs.

LLOYD ROBERTSON, Superintendent, DEPARTMENT OF LIQUOR LICENSES and CONTROL; ARIZONA DEPARTMENT OF LIQUOR LICENSES and CONTROL, an Arizona administrative agency, Defendants/Appellants.

MANDATE

March 10, 1980 Motion for Rehearing.
April 1, 1980 Objections to Motion for Rehearing.
April 9, 1980 ORDER denying Motion for Rehearing.
April 23, 1980 Petition for Review.
May 6, 1980 Petition for Review DENIED by order of the Arizona Supreme Court.

hirsh and bayles P.C.
ATTORNEYS AT LAW (602) 884-9830
120 West Broadway Tucson, Arizona 85701 La Placita Village

Attorney for Plaintiff/Appellee

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

CHARLES BARMAT, Plaintiff/Appellee, vs. LLOYD ROBERTSON, Superintendent, DEPARTMENT OF LIQUOR LICENSES AND CONTROL; ARIZONA DEPARTMENT OF LIQUOR LICENSES AND CONTROL, an Arizona administrative agency, Defendants/Appellants.	No. 2 CA-CIV 3299 (Pima County Superior Court Cause No. 158329) NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that CHARLES BARMAT, the appellee above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Arizona Court of Appeals reversing the decision of the Superior Court for which the Petition for Review was denied by the Arizona Supreme Court on May 8, 1980.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

HIRSH & BAYLES, P.C.

By _____
L. Anthony Fines
Attorneys for Appellee

By _____
Robert J. Hirsh
Attorneys for Appellee

Copy of the foregoing
sent this 27 day
of June, 1980, to:

The Honorable Robert K. Corbin
The Attorney General
Michael W. Sillyman, Esq.
Assistant Attorney General
West Addition - Second Floor
State Capitol Building
1700 West Washington Street
Phoenix, Arizona 85007

James N. Corbett, Clerk
Pima County Superior Court
Courts Building
111 West Congress
Tucson, Arizona 85701

The Honorable William E. Druke
Judge, Pima County Superior Court
Division Eleven
111 West Congress
Tucson, Arizona 85701

Hirsh and Bayles PC
ATTORNEYS AT LAW
120 West Broadway Tucson, Arizona 85701 (602) 884-9630
La Placita Village

hirsh and bayles P.C
ATTORNEYS AT LAW (602) 884-9630
120 West Broadway Tucson, Arizona 85701 La Placita Village

Attorney for Plaintiff/Appellee

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

CHARLES BARMAT, Plaintiff/Appellee, vs. LLOYD ROBERTSON, Superintendent, DEPARTMENT OF LIQUOR LICENSES AND CONTROL; ARIZONA DEPARTMENT OF LIQUOR LICENSES AND CONTROL, an Arizona administrative agency, Defendants/Appellants.	No. 2 CA-CIV 3299 (Pima County Superior Court Cause No. 158329) AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

L. ANTHONY FINES, being first duly sworn upon his oath, deposes and says:

1. That he is one of the attorneys for the plaintiff in the above captioned matter.

2. That on or about June 27, 1980, he caused to be placed in the United States mail, postage prepaid, a copy of the Notice of Appeal to the Supreme Court of the United States, addressed as follows:

Honorable Robert K. Corbin
The Attorney General
Michael W. Sillyman, Esq.
Assistant Attorney General
West Addition - Second Floor
State Capitol Building
1700 West Washington
Phoenix, Arizona 85007

...

James N. Corbett, Clerk
Pima County Superior Court
Courts Building
111 West Congress
Tucson, Arizona 85701

Honorable William E. Druke
Judge, Pima County Superior Court
Division Eleven
111 West Congress
Tucson, Arizona 85701

3. That every party required to be served has been served.

Dated: June 27, 1980.

L. Anthony Fines

SUBSCRIBED AND SWORN TO before me this 27th day of June, 1980 by L. Anthony Fines.

Notary Public

My Commission Expires:

7-18-82

hirsh and bayles PC
ATTORNEYS AT LAW
120 West Broadway Tucson Arizona 85701 (602) 884-9630
La Placita Village

RECEIVED JUN 19 1980

FILED
JUN 18 1980
CLERK COURT OF APPEALS
Division Two

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CHARLES BARMAT, Plaintiff/Appellee,	)	2 CA-CIV 3299
v.	)	ORDER
LLOYD ROBERTSON, Superintendant, DEPARTMENT OF LIQUOR LICENSES and CONTROL; ARIZONA DEPARTMENT OF LIQUOR LICENSES and CONTROL, an Arizona administrative agency, Defendants/Appellants.	)	(PIMA County Superior Court Cause No. 158329)

Petition for Stay is granted; it is

ORDERED that the Arizona State Liquor Board is Stayed from ordering a ten day suspension of Appellee's license to sell alcoholic beverages, same to remain in full force and effect during the pendency of proceedings directed to the United States Supreme Court.

Dated: June 18, 1980.

James D. Hathaway, Chief Judge

Lawrence Howard, Judge.

James L. Richmond, Judge.

Copies of the foregoing
Order mailed this 18
day of June 1980 to:

Hon. Robert K. Corbin
The Attorney General
State Capitol Building
West Wing, Second Floor
1700 W. Washington
Phoenix, Arizona 85007
Attn: Michael W. Sillyman
Assistant Attorney General

Hirsh and Bayles, P.C.
La Placita Village
120 W. Broadway
Tucson, Arizona 85701
Attn: Donald H. Bayles, Jr., Esq.
L. Anthony Fines, Esq.

Mr. James N. Corbett, Clerk
Pima County Superior Court
Courts Building
111 West Congress Street
Tucson, Arizona 85701
(true copy)

The Honorable William E. Druke, Judge
Pima County Superior Court
Division Eleven
111 West Congress Street
Tucson, Arizona 85701

STATE OF NEW YORK

COUNTY OF APPEALS

SupCt No. 294
Dennis Bellanca, d.ba. The Main Event, et al.,
Respondents,
v.

New York State Liquor Authority, et al.,
Appellants.

OPINION
This opinion is uncorrected and subject to revision before publication in the New York Reports.

(294) Robert Abrams, Attorney-General (Peter J. Dooley & Shirley Adelson Siegel of counsel) for appellant.
George P. Doyle, Buffalo, for respondents

WACHTLER, J.

The question on this appeal is whether a provision of the alcohol Beverage Control Law (§106 subd 6-2) is unconstitutional insofar as it prohibits topless dancing at premises licensed by the State Liquor Authority. The Supreme Court, Erie County, held this portion of the statute unconstitutional. The State

has appealed directly to this court pursuant to CPLR 5601(b)(2).

The plaintiffs are the owners of night-clubs, bars and restaurants which, for several years, have featured topless dancing. The plaintiffs also sell alcoholic beverages to their patrons for consumption on the premises, pursuant to licenses issued by the State Liquor Authority. That agency has adopted rules prohibiting nudity and "lewd or indecent conduct" on premises licenses to sell alcohol.[1] The rules also specifically prohibit the licensee from permitting "any female" to appear with breasts "expose[ed] to view" but, as originally adopted, contained an exception for topless dancing which, although no prohibited, was subject to strict regulation.[2]

In 1977 the Legislature added nearly identical provisions to the Alcoholic Beverage Control Law (L.1977 c 321 §1). However, this statute (Alcoholic Beverage Control Law §106 subd 6-2) did not carry forward the exception permitting topless dancing.[3] No criminal

penalty is provided for violating this statute (see Alcoholic Beverage Control Law § 130[3] and [5]). But a violation of this law may result in a loss of the liquor license (9 NYCRR 53.1[s]).

The plaintiffs commenced this declaratory judgment action claiming that subdivision 6-a is unconstitutional to the extent it prohibits all topless dancing at premises licensed by the State Liquor Authority. The plaintiffs stated that they had always complied with the Liquor Authority's rules and restrictions with respect to topless dancing. In addition it was alleged that this activity is not observable from the public streets and the fact that it is featured is clearly noted on signs posted outside the plaintiffs' premises. "Consequently", the complaint states, "no person has been exposed to topless dancing performances at plaintiffs' premises except by choice." In their first cause of action they argue that the topless dancing featured at their establishment "is not lewd or obscene

within the meaning of the United States Constitution and is a form of protected expression under the First Amendment." In the remaining three causes of action the plaintiffs claim that subdivision 6-a is also overbroad, violates the equal protection clause and infringes on their freedom of expression guaranteed by Article 1, secti n 8 of the State Constitution. They therefore asked the courts to declare subdivision 6-a unconstitutional to the extent that it prohibits topless dancing in licenses premises and also sought an injunction barring the State from enforcing this law in the future.

In response the State contended that "notwithstanding the constitutional provisions which guarantee freedom of expression" it may, pursuant to the Twenty-first Amendment of the United States Constitution "regulate the type of entertainment in establishments licenses in this State to sell alcoholic beverages."[4]

The trial court recognized the State's broad power to control and regulate the sale

of liquor in order to protect the public from its effects (California v LaRue, 409 U.S. 109). It found, however, that topless dancing is "a type of expression protected by the First Amendment" and that the State had failed to "show some serious and compelling reason to limit it. Bland reliance on the Twenty-first Amendment is insufficient". Thus the court declared subdivision 6-2 unconstitutional as applied to topless dancing in licensed premises, and to that extent, enjoined its enforcement.[5]

On this appeal the State contends that this judgment is inconsistent with the United States Supreme Court's holding in California v LaRue, (supra).

In LaRue the Court held facially valid certain administrative rules regulating the type of entertainment th t might be presented in bars and nightclubs licenses by the State. The rules prohibited what the Court described as acts of "gross sexuality" including display of the genitals and live or filmed

performances of sexual acts. They noted that before the rules were promulgated, hearings were held and it was shown that at premises where these acts were performed, "numerous incidents of ligitimate concern to the Department had occurred" (California v. LaRue, supra p 111). [T]hese incidents included "bacchanalian revelries" involving public sexual acts between customers and entertainers, as well as assaults, rape and indecent exposure committed at or near such premises.

In upholding the regulations the court observed that the Twenty-first Amendment, granting the States power over the sale and distribution of liquor within their borders, has been recognized as conferring on the States something more than the normal authority inherent in the public power. Although that amendment did not nullify the other provisions of the Constitution whenever the State seeks to regulate the sale of liquor, it did serve to "strengthen" the State's authority in that particular area. The court conceded that

some of the performances prohibited by the regulations would be entitled to constitutional protection but noted that the regulations claimed to be invalid on their face, in "substance" prohibited performances "that partake more of gross sexuality than of communication" (California v LaRue, supra p 118). The State's conclusion that these acts should not be permitted at places authorized to sell liquor was held not to be "an irrational one" in light of "the evidence from the hearings" (California v LaRue, supra p 115-116, 118). "Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution" (California v LaRue, supra, p 118-119).

In the case now before us the plaintiffs do not claim a right to offer performances of explicit sexual acts, live or filmed, real or simulated. Nor are we concerned with nude

dancing. There is no contention that the plaintiffs should have a right to present their dancers entirely unclothed, and thus they do not challenge that portion of the statute which prohibits nudity. Nor do they contest the statute insofar as it would prohibit women other than dancers from appearing bare-breasted on their premises. Similarily the plaintiffs do not contest the State's right to place some restriction on topless dancing performances as the Liquor Authority's regulations have done in the past. Finally, of course, the plaintiffs do not claim that they are exempted from the obscenity laws or that topless dancing should always be allowed no matter now, or where performed. The only question before us is whether the statute is constitutional to the extent that it absolutely prohibits liquor licensees from presenting non-obscene topless dancing performances to willing customers under all circumstances.

Thus unlike the court in LaRue, we are not

confronted with a broad attack on the facial validity of a statute which in "substance" prohibits acts of "gross sexuality", most of which are probably criminally obscene as well. Here the challenge narrowly focuses on a rule prohibiting a single activity, topless dancing, which is not inherently obscene. On the contrary it has been legally recognized as a form of expression (Doran v Salem Inn, 422 U.S.922) like nudity in art and sculture. Of course involving conduct, as it does, it is undoubtedly subject to more restrictions than the more static arts. But although offensive to some, as all nudity or partial nudity is, it is nevertheless entitled to at least minimal protection under the First Amendment. Certainly the State could not prohibit topless dancing under all circumstances (Doran v Salem Inn, supra). Neither, in our view, may the State arbitrarily prohibit it at all places licenses to sell alcohol.[6]

Here there is nothing in the record to show that the State's conclusion, that this

activity should not take place at licenses premises, was rationally based on evidence demonstrating a need for the rule. Indeed it appears that the law was not prompted by hearings or any legislative awareness of deficiencies in the prior regulation permitting topless dancing subject to restrictions and the continued supervision of the State Liquor Authority.

The State urges however that we indulge an additional presumption and assume that the Legislature did investigateand find sufficient facts to support the legislation (see, e.g. I.L.F.Y. Co. v Temporary State Housing R. Com., 10 NY2d 263, 269; Defiance Milk Products Co v DyMond, 309 NY537). But even if the presumption could be held to be equivalent to the actual findings made in LaRue - a question we need not decide - it would be inappropriate in this case to presume that topless dancing posed a problem in premises licensed by the State Liquor Authority. It is, in fact, hard to imagine that the agency, which is so vigilant in enforcing the liquor laws and

its own regulations would have continued to permit topless dancing at premises authorized to sell liquor if the audiences degenerated into "bacchanalian revelries" or became involved in "incidents of legitimate concern" to the State. Notably, even in California where such incidents occurred in bars permitting gross sexuality, the State found no need to prohibit topless dancing. It simply imposed restrictions similar to those previously found acceptable by the State Liquor Authority in this State (see, California v LaRue, 326 F. Supp 348, 359).

The State's power to control and regulate the sale of alcoholic beverages is designed to protect the public from abuses related to alcohol consumption. It is not a license to censor whatever occurs at premises authorized to sell alcohol. Thus when the State employs this power in such a way as to infringe on activities entitled to some constitutional protection, it must at least demonstrate that there is a rational connection between the

activity sought to be prohibited and the State's legitimate concern in controlling liquor consumption.[7] On the record before us there is nothing which would rationally support a conclusion that in this State it is dangerous to mix alcohol and topless dancing.

Accordingly the judgment of the Supreme Court, Erie County, should be affirmed.

FOOTNOTES

[1] The rules provide that a license or permit may be revoked, cancelled or suspended "for suffering or permitting on licensed premises (1) any lewd or indecent conduct or (2) any person to appear unclothed or in such manner or attire as to expose to view any portion of the pubic hair, anus, vulva or genitals, or any simulation thereof" (9 NYCRR §53.1[r]).

[2] This rule (former subd [s] of 9 NYCRR 53.1) provided that the licensee should not suffer or permit "any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof [except that] the provisions of this subdivision shall not apply to any female entertainer performing on a stage or platform which is at least eighteen inches above the immediate floor level and which is removed by at least six feet from the nearest patron.

[3] The statute reads as follows: "No retail licensee for on-premises consumption shall suffer or permit any person to appear on licensed premises in such manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of the breast below the top of the areola" (Alcoholic Control Law §106, sub 6-a).

[4] The Twenty-first Amendment, which repealed national prohibition, also provides in the section: "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intodicating liquors in violation of the laws thereof, is hereby prohibited."

[5] The court expressly relied on the First Amendment. Although it also concluded summarily, that subdivision 6-2 violated Art 1 sec 8 of the State Constitution, we find it unnecessary to consider that question or the additional points raised in the complaint, since in our view, the First Amendment argument presented in the first cause of action is dispositive.

[6] We recognize, as the dissent does, that in Doran the Supreme Court observed, in dictum (at pp 432-433), that they had concluded in LaRue that "the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program." We also note, however, that more recently the Supreme Court has taken a narrower view of its holding in LaRue, indicating again by way of dictum, that in that case they had simply "relied upon the Twenty-first Amendment to 'strengthen the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least where performances 'partake more of gross sexuality than communication'" (Craig v. Boren, 429 US 190, 207). We, of course, do not consider this dictum any more controlling than the contrary dictum in Doran. What we do consider dispositive are the factors which th Supreme Court discussed so extensively and actually relied upon in LaRue as noted above.

[7] Of course when the State seeks to prohibit more traditional forms of expression, it must make a more compelling showing of need for the restriction. For instance, it would be most difficult to sustain a law prohibiting political discussions in places where alcohol is sold by the drink, even though the record may show, conclusively, that political discussions in bars often lead to disorderly behavior, assaults and even homicide.

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GABRIELLI, J. (dissenting):

I am impelled to dissent, for the holding of the majority is based upon what I perceive to be a misstatement of the law an ununciated by the United States Supreme Court in Doran v Salem Inn, Inc (422 US 922) and California vLaRue (409 US 109).

At issue on this appeal is the power of a State to prohibit topless dancing in an establishment which sells liquor for on premises consumption. The majority finds this prohibition to be unconstitutional, apparently premising this conclusion upon the belief that the State bears the burden of justifying the rationality of its ban upon topless dancing in driking establishments, because topless dancing is entitled to some First Amendment protections. The most recent pronouncements of the Supreme Court upon this subject, however, are expressly to the contrary (see California v LaRue, supra, at 118-119; Doran v Salem Inn, Inc., supra,

at 932-933.

When a State acts to regulate the sale of liquor within its boundaries, its authority stems not merely from the normal police power of the State, but also directly from the Twenty-first Amendment to the United States Constitution. This grant of power by the Constitution serves to increase that authority which a State normally enjoys and to place a significantly greater burden upon a party seeking to challenge a State regulation of liquor as violative of some other provision of the United States Constitution. This is not to suggest that a State acting under the authority of the Twenty-first Amendment is free to ignore all other parts of the Federal Constitution (see, eg, Wisconsin v Constantineau, 400 US 433; Craig v Boren, 429 US 190). Rather, the effect of the Twenty-first Amendment is to require those who would challenge a State regulation of liquor on the ground that it is violative of some other Constitutional provision or of

supreme Federal law, to prove that the particular interplay of provisions and purposes in each case mandates a disregard of the State's otherwise legitimate powers (compare Hostetter v Idlewild Liquor Corp, 377 US 324, Seagram & Sons v Hostetter, 384 US 35, and State Board v Young's Market Co, 299 US 59, with California Retain Liquor Dealers Association v Midcal Aluminum, Inc., 48 USLW 4238, ___US___).

In the instant case, plaintiffs claim that the ban on topless dancing in establishments which sell liquor for on premises consumption is violative of the First Amendment. It is, of course, far too late in the day to suggest that dancing, even topless or nude dancing, is entitled to absolutely no First Amendment protections. Indeed, in both California v LaRue, supra, 409 US at 118 and Doran v. Salem Inn, Inc., supra, 422 US at 932 the Supreme Court specifically recognized that such "entertainment" is not bereft of all protection because it does have some communicative

aspects. At the same time, however, the Court noted, with care, that such "art" forms "involve only the barest minimum of protected expression" (Doran v Salem Inn, Inc., supra, 422 US at 932; accord, California v LaRue, supra, 409 US at 117-118).

Because topless barroom dancing has so little communicative content and is accordingly entitled to only a minimum of First Amendment protection, whereas the State has the responsibility and, under the Twenty-first Amendment, the power to regulate the sale and use of liquors, the Supreme Court has declared not only that a statute prohibiting or limiting such barroon dancing must be upheld unless it is clearly irrational, but also that the burden is on the challenger of such a law to overcome a presumption of constitutionality and prove that the law is irrational (California v LaRue, supra, 409 US at 118-119). Indeed in Doran v Salem Inn, Inc., the Court expressly stated that "[i]n LaRue, however, we

concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program" (supra, 422 US at 932-933). Moreover, and of great significance, in that same opinion, the Court intimated that the ban on topless dancing there involved would clearly have been constitutional had it been enacted pursuant to the State's powers under the Twenty-first Amendment and accordingly limited to establishments selling liquor (Doran v Salem Inn, Inc., supra, 422 US at 933).

Applying these principles to the instant case, it is painfully obvious that the challenged statute is indeed valid and constitutional. Clearly, plaintiffs have not met their burden of proving this particular exercise of the State's power to regulate the sale of liquors to be irrational. Indeed,

even the majority of this Court appears to have impliedly conceded that plaintiffs have failed to meet th s burden since, in order to declare the statute unconstitutional, the majority was forced to place the burden of proving the statute's reasonableness upon the State, in direct contradiction to the doctrine enunciated in LaRue. Moreover, since this statute does contain the very limitations which the Supreme Court indicated would have sufficed to place the ordinance at issue in Doran beyond challenge, I find it impossible to concur in the result reached by a majority of this Court today.

In conclusion, I must emphasize that judges called upon to determine the constitutionality of a challenged statute are required to set aside their personal opinions of what is best and strive "to resolve the issue by constitutional measurement, free of emotion of predilection" (Roe v Wade, 410 US 113, 116). This is so far the very basic reason that "the accident of our finding certain opinions

natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution" (Lochner v New York, 198 US 45, 76 [Holmes, J., dissenting]). In his official capacity, a judge may serve neither as a moralist nor as a libertine, but simply must endeavor to decide each case on the basis of the applicable law. Thus, whatever artistic or communicative value may attach to topless dancing is here overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. No reasonable person, moralist or not, could deny that the admixture of alcohol and topless dancing presents a very real possibility of disturbances of the public peace in licensed premises, a problem which may be addressed in advance by the Legislature. The elected representatives of the people of this State have now chosen to avoid such disturbances by means of a reasonable restriction upon establish-

ments which sell liquor for on premises consumption. Although some may believe this solution to be unwise or unnecessary, there exists no justification for disturbing the legislative judgment in this case.

Accordinging, I dissent and vote to reverse the judgment appealed from and to declare the statute to be constitutional.

* *

Judgment affirmed, with costs. Opinion by Wachtler, J. All concur except Gabrielli, J., who dissents and votes to reverse in an opinion in which Cooke, Ch.J., and Jasen, J., concur.

Decided June 10, 1980

Arizona Department of Liquor License and Control Superintendent's Regulations R4-15-32 and R4-15-57:

"R4-15-32. Violence, Report of

A licensee upon whose licensed premises an act of violence occurs shall make a detailed, written report within 24 hours of such act of violence to the Department of Liquor Licenses and Control. An act of violence shall be construed to include any disturbance in which bodily injuries, fatal or not, are sustained by any person including, but not limited to, riots, brawls or public commotions of sufficient intensity as to require the intervention of peace officers, the licensee, or other persons to restore normal order.

* * * *

R4-15-57. Prostitution Solicitation Prohibited

No licensee, or employee thereof, shall knowingly permit, on the licensed premises,

any solicitation of, or act of, prostitution.

If the provisions of this rule or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end, the provisions of this rule are severable.